Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OPERATION RESCUE,

Petitioner,

vs.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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364 pp

QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in ruling, in conflict with the Ninth Circuit, that private civil litigants may obtain injunctive relief under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute?

2. Whether the "obtaining of property" element of the federal extortion statute, which is a predicate offense for civil RICO, may be satisfied, as the Seventh Circuit held, merely by a showing of "interference with the rights" of another?

3. Whether civil RICO liability may be imposed where the jury is instructed on "generic" state extortion law, instead of the pertinent elements of each state's extortion law, as a RICO predicate offense?

4. Whether the Seventh Circuit erred by affirming civil liability based on guilt by association and in holding, in conflict with the Second Circuit, that the First Amendment does not require a finder of fact to identify the alleged acts of unlawful conduct, and their alleged perpetrators, before imposing civil liability upon defendants engaged in protected expressive activity?

PARTIES

In addition to petitioner Operation Rescue,[1] the following parties were defendants-appellants in the Seventh Circuit and are nominal respondents here (*see* S. Ct. R. 12.6):

Joseph M. Scheidler
Pro-Life Action League, Inc.
Andrew D. Scholberg
Timothy Murphy

Respondent National Organization for Women, Inc. (NOW), plaintiff-appellee below, sued on behalf of itself and its members and was certified as representative of the plaintiff "class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities." App. 269a. In addition, there are two other named respondents, the Delaware Women's Health Organization, Inc. (DWHO) and the Summit Women's Health Organization, Inc. (Summit). Both DWHO and Summit sued on behalf of themselves and were certified as representatives of the plaintiff "class of all women's health centers in the United States at which abortions are performed." *Id.* These respondents, like NOW, were plaintiffs-appellees in the Seventh Circuit.

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[1]Operation Rescue is not a corporation. *See* S. Ct. Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES viii

ABBREVIATIONS KEY xvi

DECISIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND POLICIES 1

STATEMENT OF THE CASE 1

1. Jurisdiction in District Court 1

2. Facts Material to Consideration of the Questions .. 2

   a. Availability of injunctive relief to private plaintiffs under RICO 2

   b. Meaning of "obtaining of property" element of Hobbs Act extortion 2

   c. Generic state extortion 4

d. First Amendment violations 5

REASONS FOR GRANTING THE WRIT 8

I. THE SEVENTH CIRCUIT IN EFFECT AMENDED RICO TO CREATE A PRIVATE INJUNCTIVE REMEDY, THEREBY CAUSING A CIRCUIT SPLIT 10

A. Split in the Circuits 10

B. Conflict with this Court's Precedent 12

C. Disregard of Text and History of RICO 13

1. RICO's Statutory Text 13

2. RICO's Legislative History 15

a. Selection of treble damages remedy 15

b. Rejection of private injunctive remedy 16

D. Importance of the Question 19

II. THE SEVENTH CIRCUIT STRETCHED THE HOBBS ACT BEYOND RECOGNITION 19

III. THE SEVENTH CIRCUIT UPHELD A JUDGMENT RESTING IN PART UPON FICTIONAL GENERIC STATE EXTORTION LAW 23

A. Federal criterion 24

B. State criterion 24

IV. THE SEVENTH CIRCUIT FAILED TO RESPECT THE FIRST AMENDMENT 26

CONCLUSION 30

APPENDICES

A. Decision of the U.S. Court of Appeals for the Seventh Circuit (Oct. 2, 2001) 1a

B. Decision of the U.S. Supreme Court (Jan. 24, 1994) 39a

C. Order of the Seventh Circuit (May 16, 1994) (remanding to district court) 56a

D. Memorandum Opinion and Order of the District Court (N.D. Ill. July 25, 1995) (dismissing and striking complaint in part) 61a

E. Memorandum Opinion and Order of the District Court (N.D. Ill. Sept. 23, 1997) (granting summary judgment in part) 157a

F. Minute Order of the District Court (N.D. Ill. Sept. 17, 1998) (denying remittitur and new trial) 232a

G. Memorandum and Opinion of District Court (N.D. Ill. July 16, 1999) (granting permanent injunction) 233a

H. Minute Order of the District Court (N.D. Ill. Aug. 5, 1999) (denying various motions) 275a

I. Judgment of the District Court (N.D. Ill. Aug. 25, 1999) 277a

J. Memorandum Opinion and Order of the District Court (N.D. Ill. Mar. 28, 2001) (denying joint Rule 60(b) motion) 283a

K. Order of the U.S. Court of Appeals for the Seventh Circuit (May 18, 2001) (consolidating appeal from Rule 60(b) Order with pending appeals) 295a

L. Order of the U.S. Court of Appeals for the Seventh Circuit (Oct. 29, 2001) (denying rehearing) 297a

M. U.S. Const. amend. I 299a

N. Hobbs Act, 18 U.S.C. § 1951 ..... 300a

O. RICO [excerpts], 18 U.S.C. §§ 1961, 1964 ..... 302a

P. Jury's Special Interrogatories and Verdict Form . 310a

TABLE OF AUTHORITIES

Page

Cases

Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) 12, 13, 15, 16, 18

Airline Reporting Corp. v. Barry, 825 F.2d 1220 (8th Cir. 1987) 12

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 25

Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 103 F. Supp. 2d 134 (N.D.N.Y. 2000), *aff'd*, 268 F.3d 103 (2d Cir. 2001) 11

Beck v. Prupis, 529 U.S. 494 (2000) 15

Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983) 12

Bernard v. Taub, 1990 WL 34680 (E.D.N.Y. Mar. 21, 1990) 11

Bouie v. Columbia, 378 U.S. 347 (1964) 22

Chambers Development Co. v. Browning-Ferris Industries, 590 F. Supp. 1528 (W.D. Pa. 1984) 11

Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123 (D.N.J. 1989) 11

Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983) ... 12

DeMent v. Abbott Capital Corp., 589 F. Supp. 1378 (N.D. Ill. 1984) 11

Evans v. United States, 504 U.S. 255 (1992) 21

F.T. Int'l, Ltd. v. Mason, 2000 U.S. Dist. LEXIS 14979 (E.D. Pa. Oct. 11, 2000) 11

First Nat'l Bank and Trust Co. v. Hollingsworth, 701 F. Supp. 701 (W.D. Ark. 1988). 11

Galerie Furstenberg v. Coffaro, 697 F. Supp. 1282 (S.D.N.Y. 1988) 11

Ganey v. Raffone, 91 F.3d 143 (6th Cir. 1996) 12

Griffin v. United States, 502 U.S. 46 (1991) 5, 23

Holmes v. SIPC, 503 U.S. 258 (1992) 13

In re Fredeman Litigation, 843 F.2d 821 (5th Cir. 1988) 11, 16

Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) .. 14

Johnson v. Collins Entertainment Co., 199 F.3d 710 (4th Cir. 1999) 12

Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983) 11

Klehr v. A. O. Smith Harvestore Products, Inc., 521 U.S. 179 (1997) 15

Lincoln House, Inc. v. Dupre, 903 F.2d 845 (1st Cir. 1990) 12

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 15

Miller v. Affiliated Financial Corp., 600 F. Supp. 987 (N.D. Ill. 1984) 11

Minnesota v. Northern Securities Co., 194 U.S. 48 (1904) 12

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 10, 26, 27, 29

National Organization for Women v. Scheidler, 765 F. Supp. 937 (N.D. Ill. 1991) 1

National Organization for Women v. Scheidler, 968 F.2d 612 (7th Cir. 1992) 1

National Organization for Women v. Scheidler, 508 U.S. 971 (1993) 1

National Organization for Women v. Scheidler,
510 U.S. 249 (1994) 1, 10, 26

National Organization for Women v. Scheidler,
897 F. Supp. 1047 (N.D. Ill. 1995) 1, 2, 3

National Organization for Women v. Scheidler,
172 F.R.D. 351 (N.D. Ill. 1997) 1

National Organization for Women v. Scheidler,
267 F.3d 687 (7th Cir. 2001) ..... 1, *passim*

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) 14

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.,
185 F.3d 957 (9th Cir. 1999), *cert. denied*,
528 U.S. 1075 (2000) 11

P.R.F., Inc. v. Philips Credit Corp.,
1992 WL 385170 (D.P.R. Dec. 21, 1992) 11

Paine Lumber Co. v. Neal, 244 U.S. 459 (1917) 12

People of New York ex rel. Spitzer v. Operation Rescue National, 273 F.3d 184 (2d Cir. 2001) 30

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ... 26

R.E. Davis Chemical Corp. v. Nalco Chemical Co.,
757 F. Supp. 1499 (N.D. Ill. 1990) 11

Raymark Industries, Inc. v. Stemple,
714 F. Supp. 460 (D. Kan. 1988) 12

Religious Technology Center v. Wollersheim,
796 F.2d 1076 (9th Cir. 1986), *cert. denied*,
479 U.S. 1103 (1987) 10, 11, 17

Reves v. Ernst & Young, 507 U.S. 170 (1993) 14

Rotella v. Wood, 528 U.S. 549 (2000) 15

Russello v. United States, 464 U.S. 16 (1983) 19

Salinas v. United States, 522 U.S. 52 (1997) 24

Sedima, S.P.R.L. v. Imrex, 741 F.2d 482
(2d Cir. 1984), *rev'd on other grounds*,
473 U.S. 479 (1985) 12, 18

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479
(1985) 13, 15-18

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1990) 14

*Sterling Suffolk Racecourse Limited Partnership v.
Burrillville Racing Ass'n*, 802 F. Supp. 662 (D.R.I.
1992), *aff'd*, 989 F.2d 1266 (1st Cir.), *cert. denied*,
510 U.S. 1024 (1993) 11

Town of West Hartford v. Operation Rescue, 726 F. Supp. 371 (D. Conn. 1989), *vac'd*, 991 F.2d 1039 (2d Cir.), *cert. denied*, 510 U.S. 865 (1993) 11

Trane Co. v. O'Connor Securities, 718 F.2d 26 (2d Cir. 1983) 12

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 15

United States v. Enmons, 410 U.S. 396 (1973) 21

United States v. Nardello, 393 U.S. 286 (1969) 23, 24

United States v. Nedley, 255 F.2d 350 (3d Cir. 1958) 22

United States v. Panaro, 266 F.3d 939 (9th Cir. 2001) .. 22

Vietnam Veterans of America, Inc. v. Guerdon Industries, Inc., 644 F. Supp. 951 (D. Del. 1986) 11

Constitutional provisions, statutes, and rules

U.S. Const. amend. I ..... i, *passim*

U.S. Const. amend. V 9, 22, 26

18 U.S.C. § 1951 ..... 1, *passim*

18 U.S.C. § 1952 ..... 4, 26

18 U.S.C. § 1961 ..... 1, 20, 23, 25, 26

18 U.S.C. § 1964 ..... 1, *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

Del. Code. Ann. tit. 11 25

Wis. Stat. Ann. § 943.30(1) 25

S. Ct. R. 12.6 ii

S. Ct. Rule 29.6 ii

Fed. R. Civ. P. 23 25

Fed. R. Civ. P. 60(b) 7

Other Authorities

31A Am. Jr. 2d *Extortion, Blackmail, and Threats*, §§ 40, 49-50 (1989) 25

115 Cong. Rec. 6,992-96 17

116 Cong. Rec. 27,738 17

116 Cong. Rec. 35,227-28 17

116 Cong. Rec. 35,346-47 ..... 17, 18

117 Cong. Rec. 46,386 18

117 Cong. Rec. 46,393 18

118 Cong. Rec. 29,368, 29,370 18

119 Cong. Rec. 10,317-19 18

H.R. 19215, 91st Cong., 2d Sess. (1970) 17

H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4034 17

Model Penal Code (1980) 25

Note, *Protestors, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691 (1999) 20, 22

Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1970-1971) 18

ABBREVIATIONS KEY

App.	Appendix to the Petition for Certiorari
OR Reh'g Pet.	Petition for Rehearing and Rehearing En Banc of Defendant-Appellant Operation Rescue in Seventh Circuit
PA	Plaintiffs' Appendix in Seventh Circuit
Tr.	Trial transcript in district court

DECISIONS BELOW

All pertinent decisions in this case to date are entitled *National Organization for Women v. Scheidler*. The district court's original dismissal of the case appears at 765 F. Supp. 937 (N.D. Ill. 1991), and the Seventh Circuit's affirmance at 968 F.2d 612 (7th Cir. 1992). This Court's partial grant of certiorari appears at 508 U.S. 971 (1993), and subsequent reversal at 510 U.S. 249 (1994). On remand, the district court's partial dismissal of the case appears at 897 F. Supp. 1047 (N.D. Ill. 1995), and the district court's certification of plaintiff classes appears at 172 F.R.D. 351 (N.D. Ill. 1997). The Seventh Circuit's decision below, affirming judgment for respondents, appears at 267 F.3d 687 (7th Cir. 2001).

JURISDICTION

The U.S. Court of Appeals rendered its panel decision on October 2, 2001, and denied timely petitions for rehearing and rehearing en banc on October 29, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICIES

The Appendix contains the text of the First Amendment to the U.S. Constitution (App. M), the Hobbs Act, 18 U.S.C. § 1951 (App. N), and excerpts of the federal RICO statute, 18 U.S.C. § 1961, 1964 (App. O).

STATEMENT OF THE CASE

1. Jurisdiction in District Court

This is a civil RICO case in which the district court's jurisdiction was invoked, *inter alia*, under 28 U.S.C. § 1331 and 18 U.S.C. § 1964.

Respondents -- plaintiffs below -- are the National Organization for Women, Inc. (NOW), the Delaware Women's

Health Organization (DWHO), the Summit Women's Health Organization (Summit), and the classes they were certified to represent. (The plaintiffs changed over the course of the litigation. For convenience, this brief refers collectively to "NOW.") The defendants, including petitioner Operation Rescue (OR), are pro-life activist individuals and organizations.

2. Facts Material to Consideration of the Questions

a. Availability of injunctive relief to private plaintiffs under RICO

The question whether RICO authorizes private parties to sue for injunctive relief is a pure question of law. Material to that question are the undisputed facts that respondents (plaintiffs) are private parties and that all of respondents' claims other than RICO were eliminated prior to trial and final judgment. The district court rejected petitioner's contention that RICO does not authorize private parties to sue for injunctive relief, App. 131a-134a, 261a, and granted a permanent injunction, App. G, I. The Seventh Circuit affirmed, holding -- despite a contrary holding in the Ninth Circuit -- that RICO authorizes private injunctive relief. App. 7a-17a.

b. Meaning of "obtaining of property" element of Hobbs Act extortion

The question whether the "obtaining of property" element of the federal extortion statute, 18 U.S.C. § 1951(b)(2), can be satisfied by merely causing "a loss to, or interference with the rights of," the alleged victim, *see* App. 36a, is a pure question of law. Material to that question are the following undisputed facts: defendants were not alleged to have obtained any tangible property, Tr. 4327 -- or any intangible property like trademarks or stocks -- but only to have interfered with the business of abortion. NOW's theory of the case was that any physical

obstruction of abortion -- e.g., by a sit-in -- was extortion and thus a predicate act of racketeering under RICO. *See, e.g., id.*; *id.* at 5003-09.[2] The district court adopted this view of extortion. *E.g.*, App. 109a-111a, 195a-196a.

Under the district court's instruction, the jury was not required to find anything more than nonviolent sit-ins to find defendants liable for "extortion."[3] Tr. 4944-47. In closing arguments, NOW argued for a jury finding of "no less than 30 blockades [i.e., sit-ins]," Tr. 5005, arguing that each sit-in was an act of predicate extortion, *id.* The jury apparently found 25 sit-ins total.[4] App. 311a.[5]

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[2]E.g., Tr. 5003 (closing argument of plaintiffs) ("if the defendants prevented women from getting any of those services [provided by abortion businesses], then those interferences are RICO violations"); *id.* at 5005 ("Each and every one of those blockades that shut the clinics down for any period of time was an illegal act of extortion under RICO").

[3]While the jury found 25 acts or threats of "extortion," *infra* note 4, the jury found only four acts or threats of violence. App. 312a (#4(e)). Hence, the jury necessarily found that at least 21 -- and possibly all, *see infra* note 5 -- of the acts of "extortion" (sit-ins) were nonviolent.

One question on the jury verdict form asked whether the jury's findings of predicate extortion under the Hobbs Act or state law were "based solely on blockades of clinic doors or sit-ins within clinics, without more." App. 312a. In closing arguments to the jury, NOW argued that the phrase "without more" meant that the sit-ins "didn't keep anybody out," Tr. 4987. In other words, unless the sit-in participants always moved aside to let people "freely walk in," NOW argued, the jury must answer the question "no." Tr. 4987-88. Consequently, this question became the meaningless one, "If you found extortion, was it based solely on a blockade or sit-in where participants stepped aside for anyone coming or going?" The jury's negative answer to this question thus did not indicate a finding that sit-ins were violent.

[4]The jury was instructed to treat each intentional sit-in at an abortion business as both *actual* and *attempted* extortion. *See* Tr. 4945-48.

(continued...)

On appeal, defendants contested the failure to require NOW to prove the "obtaining of property."[6] The Seventh Circuit affirmed, holding that, to satisfy the element of "obtaining property" under the Hobbs Act, a "loss to, or interference with the rights of, the victim is all that is required." App. 36a.

c. Generic state extortion

The validity of substituting "generic state extortion" for the particular elements of each state law in a jury instruction is a pure question of law. Material to that question are the following undisputed facts: NOW alleged, as RICO predicates, violation of the extortion laws of various states. After initially drafting jury instructions aimed at the elements of extortion in the pertinent states, Tr. 4356, NOW offered a single "generic" instruction to replace individualized state instructions, *id.* Defendants objected, Tr. 4355-57, 4577, but the district court

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[4](...continued)
Accordingly, the jury found the same number of "acts or threats" as it did "attempts" in each category (25 each for "extortion," 23 each for Travel Act violations). App. 311a-312a. Furthermore, the instructions for state and federal extortion were virtually identical, Tr. 4944-47, with the difference that the federal version had an interstate commerce element, Tr. 4945. Accordingly, the jury found a virtually identical number of violations in the state and federal categories, with only slightly fewer in the federal categories (presumably for lack of the interstate element). App. 311a-312a. Thus, a single sit-in would count simultaneously in Verdict Form boxes 4(a), (b), (d), (f), and (g), except that 4(a), (f), and (g) also had interstate travel or commerce elements. *Id.*

[5]NOW also argued for at least five *threats* of physical violence, Tr. 5013-16, and seven *acts* of physical violence, Tr. 5022-23, but the jury found only four acts *or* threats total. App. 312a (#4(e)).

[6]The only predicate offenses under RICO at issue were extortion under the federal Hobbs Act, 18 U.S.C. § 1951, extortion under state law, and extortion under the federal Travel Act, 18 U.S.C. § 1952.

gave the generic instruction, Tr. 4947. The jury found 25 acts or threats of state law extortion. App. 311a (#4(b)).[7] The Seventh Circuit, "[w]ithout expressing an opinion on whether this approach was permissible," App. 36a, affirmed on the grounds that any error was harmless, *id.* The Seventh Circuit reasoned that the separate jury findings of *federal* extortion sufficed to support the RICO judgment, regardless of the validity of the findings of *state* extortion. App. 36a-37a. OR pointed out that the damages verdict might rest in whole or in part upon acts that the jury found exclusively to qualify as state extortion. *E.g.*, OR Reh'g Pet. at 12-13. Furthermore, OR noted, the legally faulty generic instruction would require reversal of all jury findings that potentially rested on that illegal theory, including findings essential to the judgment, such as the findings of a RICO pattern, proximate cause, and the amount of damages. *Id.* at 12 (citing *Griffin v. United States*, 502 U.S. 46, 53-56, 59 (1991)). Thus, the faulty generic state extortion instructions could not be harmless error. OR Reh'g Pet. at 12-13.[8] The Seventh Circuit denied rehearing. App. L.

d. First Amendment violations

The question whether civil liability may be imposed for unlawful conduct on the basis of associational liability in the context of pervasive expressive activity, without the finder of fact identifying the alleged unlawful acts, the alleged perpetrators of the acts, or the damages flowing from those

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[7]The jury also found 25 attempts. App. 312a (#4(d)). As noted *supra* note 4, the jury instructions required the jury to treat each sit-in as both actual and attempted extortion. Tr. 4945-48. The jury was also directed to state and federal extortion for its Travel Act verdict (regarding which the jury found 23 acts and attempts, *see* App. 312a (#4(f), (g))).

[8]If the federal extortion predicates are overturned by this Court, of course, the premise of the Seventh Circuit's finding of harmlessness would fall.

particular acts, is a pure question of law. Material to that question are the following undisputed facts: NOW conceded that "[o]bviously all the thousands of people who participate in blockades [i.e., sit-ins], Your Honor, are not co-conspirators." Tr. 453. Furthermore, the defendants' anti-abortion efforts included extensive free speech activity, such as leafleting, writing, singing, praying, and other pure speech, pickets, sidewalk counseling, etc. *See* App. 17a ("All parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities"). Defendants explicitly embraced nonviolence for their efforts. *See, e.g.*, Tr. 1332, 1357-59; PA120, PA168, PA219 (nonviolence pledge for "rescue" participants). *See also* Tr. 982, 1263, 1265, 1271, 1815, 1971, 2262-63, 2378-79 (embrace of nonviolence).[9] The activities at issue spanned some fourteen years, App. 285a, yet the jury

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[9]NOW sought to paint pro-life activists as extreme and violent by relying on isolated quotations taken out of context. For example, NOW cited the "Green Beret" image, suggesting militarism, yet the pertinent document gave as examples of "Green Berets" not just a "rescuer" willing to go to jail, but also someone who works "full-time with little or no pay for four months in the election of a pro-life candidate," PA100. NOW quoted Scheidler as urging pro-lifers to "take their fight against abortion to the doors of abortion clinics," but the letter to the editor in question refers to one-on-one sidewalk counseling outside abortion businesses, PA130. NOW quoted Scheidler using the phrase "pro-life mafia," but in context the term referred wryly to activism, not violence, PA182. *See also* PA122 (using term "aggressive tactics" to mean sit-ins and demonstrations).

NOW accused defendants of giving "special, private meanings" to the word "violence." Yet it was NOW's witnesses who defined "violence" to include virtually all pro-life activism. *See, e.g.*, Tr. 730 (Susan Hill) ("every rescue event that has been conducted in this country in the last 15 years by Operation Rescue" has "felt violent to us"); Tr. 1268 (Maureen Burke) ("every act of civil disobedience that would block access to an abortion clinic" is violent, even if "entirely passive, peaceful, nonresistant, silent"). 1278 (Burke) (sidewalk counseling, yelling, raising voice all violent).

found only four acts or threats of violence by any person associated with the alleged enterprise. *Supra* note 5.

NOW sought to impose liability upon defendants for any act, no matter how isolated, that anyone participating in a pro-life demonstration supposedly committed.[10] *E.g.*, Tr. 2228, 2231. Over defendants' objection, Tr. 4495-98,[11] the district court did not require the jury to identify any particular alleged incidents of wrongdoing.[12] Instead, the district court approved a verdict form that allowed the jury to impose liability for unspecified acts by "any other person associated with PLAN [Pro-Life Action Network, the alleged RICO enterprise]," App. 311a (#4) (predicate acts). *See also* App. 313a (#7) (RICO pattern may be based on acts of "persons associated with PLAN"); *id.* (#9) (proximate cause may rest on acts of "any person associated with PLAN"). The jury then found some two dozen unidentified predicate acts to have been committed by unspecified persons "associated with PLAN," that at least two of those acts proximately caused injury to the plaintiffs, and that the plaintiffs Summit and DWHO had suffered monetary damages from their RICO injuries. App. 311a-314a (#4, 9, 10). The district court entered judgment on this verdict, App. I, and the Seventh Circuit affirmed, finding no First Amendment defects. App. 17a-26a.

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[10]Defendants demonstrated in detail in their joint Rule 60(b) motion that at least some of the alleged incidents of misconduct were fabricated or wholly unconnected to defendants.

[11]The district court repeatedly admonished that an objection by any defendant would be deemed made on behalf of all. Tr. 475, 689, 5181.

[12]Thus, as the district court conceded, App. 254a, there is no way to know exactly what the jury found to qualify as extortionate predicates.

REASONS FOR GRANTING THE WRIT

The trial court aptly described this case as "paradigmatic of RICO's seemingly limitless applicability." App. 158a. While this case arises out of the context of protest against abortion, what is at stake legally is a massive expansion of civil RICO.

The Seventh Circuit affirmed a judgment of treble damages and a nationwide injunction in a civil RICO case brought by the National Organization for Women (NOW), two abortion businesses, and two plaintiff classes (which the named plaintiffs represented) against pro-life activists.

The Seventh Circuit's decision expands civil RICO litigation in at least four major ways:

1. Private injunctive relief -- The Seventh Circuit, creating a split in the circuits, held that private parties can obtain injunctive relief under RICO. This abrogates what had previously been the federal government's exclusive prerogative to wield RICO's awesome injunctive remedies (including "dissolution or reorganization of any enterprise").

2. Expansive rewriting of federal extortion law -- Federal extortion law (the Hobbs Act, 18 U.S.C. § 1951) is a predicate act under RICO, i.e., it is one of the limited number of crimes which can give rise to RICO liability. The Hobbs Act specifies that extortion requires "the obtaining of property" from another, but the Seventh Circuit read this element to require only "a loss to, or interference with the rights of," the alleged victim.[13] Thus, RICO is now a remedy for all "damage" or "interference with rights" (including, presumably, police interference with protesters,[14] corporate interference with the rights of employees,

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[13]Basically, the court equated a "sit-in" protest with extortion.

[14]The Hobbs Act also proscribes "obtaining of property," with consent, "under color of official right." 18 U.S.C. § 1951(b)(2). Hence, the Seventh

(continued...)

consumers, or competitors, and so forth).

3. Obliterating state law defenses -- Extortion under state law is also a RICO predicate offense. Here, NOW alleged violations of the extortion laws of various states. Rather than instruct the jury on the elements of the pertinent state laws, the district court gave a generic state extortion instruction -- a watered down, white bread substitute for particular state laws.[15] The use of "generic state law" has grave implications for all multistate litigation. First, it shows utter disrespect for each state's prerogative of determining the elements of its criminal code. Second, it denies defendants due process of law. Third, it excuses plaintiffs from the time, effort, and expense of presenting and proving the elements of each state's law, thereby artificially facilitating -- at defendants' expense -- multistate claims under RICO or other theories. Fourth, it eliminates a major objection to the certification of multistate class actions, namely, the diversity of state laws applicable to class member claims. If the distinct particularities of state law can be disregarded, certification of multistate class actions (e.g., tort or RICO suits against businesses operating in different states) that would otherwise be improper would nevertheless be allowed.

4. Elimination of First Amendment safeguards -- When this case previously came before the Court, Justices Souter and Kennedy voiced the concern that "RICO actions could deter

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[14](...continued)
Circuit's misreading of the Hobbs Act also expands the applicability of that statute (and thus RICO) to government actors.

[15]The Seventh Circuit brushed this aside as at worst harmless error because the jury also found the defendants to have committed federal extortion. The finding of federal extortion was also erroneous, however, as noted above. Moreover, even if the *federal* extortion counts were beyond reproach, the faulty generic *state* extortion instruction clearly was not harmless error. *See supra* text accompanying note 8.

protected advocacy." *NOW v. Scheidler*, 510 U.S. 249, 265 (1994) (concurring opinion). The course of this case has born out that concern. The jury was allowed to impose guilt by association, and was not required to identify what specific acts were done, much less by whom. Consequently, it was impossible independently to review the findings supporting liability or the particular damage awards. The Seventh Circuit nonetheless perceived no error. This cavalier disregard of the First Amendment protections set forth in cases like *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), gives the stamp of approval to *in terrorem* RICO litigation against ideological adversaries. The Seventh Circuit's disregard of the need for particularized findings as to who did what, prior to imposing civil liability in a First Amendment context, also conflicts with a recent decision of the Second Circuit.

NOW v. Scheidler represents a politicized misuse of civil RICO. The bad precedent it sets, however, bodes ill for all RICO litigation.

I. THE SEVENTH CIRCUIT IN EFFECT AMENDED RICO TO CREATE A PRIVATE INJUNCTIVE REMEDY, THEREBY CAUSING A CIRCUIT SPLIT.

The Seventh Circuit in the decision below created a split in the circuits by holding that the federal RICO statute authorizes private injunctive relief.

A. Split in the Circuits

In *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Ninth Circuit exhaustively analyzed the text and history of the remedies section of RICO, the pertinent precedents, and the competing legal arguments, *see Wollersheim*, 796 F.2d at 1080-88. The *Wollersheim* court concluded that "the legislative history and statutory language suggest overwhelmingly that no

private equitable action should be implied under civil RICO." *Id.* at 1088 (footnote omitted). *Wollersheim* remains good law in the Ninth Circuit. *E.g.*, *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 967-68 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000).

Many other federal courts have also addressed this question. Not a single court since *Wollersheim* -- other than in this case -- has held, contrary to *Wollersheim*, that private parties can obtain injunctive relief under RICO. Even prior to *Wollersheim*, only one district court so held.[16]

Every other case to address the issue (except in this case) has either rejected private equitable relief under RICO,[17] expressed

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[16]*Chambers Development Co. v. Browning-Ferris Industries*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984).

[17]*E.g.*, *In re Fredeman Litigation*, 843 F.2d 821, 828-30 (5th Cir. 1988); *Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Ass'n*, 802 F. Supp. 662, 671 (D.R.I. 1992), *aff'd on other grounds*, 989 F.2d 1266, 1273 n.8 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993); *P.R.F., Inc. v. Philips Credit Corp.*, 1992 WL 385170 at *2-*3 (D.P.R. Dec. 21, 1992); *Galerie Furstenberg v. Coffaro*, 697 F. Supp. 1282, 1294 (S.D.N.Y. 1988); *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 376-78 (D. Conn. 1989), *vac'd on other grounds*, 991 F.2d 1039 (2d Cir.), *cert. denied*, 510 U.S. 865 (1993); *Bernard v. Taub*, 1990 WL 34680 at *3-*4 (E.D.N.Y. Mar. 21, 1990); *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134, 155 (N.D.N.Y. 2000), *aff'd on other grounds*, 268 F.3d 103 (2d Cir. 2001); *Vietnam Veterans of America, Inc. v. Guerdon Industries, Inc.*, 644 F. Supp. 951, 960-61 (D. Del. 1986); *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1137-38 (D.N.J. 1989); *F.T. Int'l, Ltd. v. Mason*, 2000 U.S. Dist. LEXIS 14979 at *3 n.2 (E.D. Pa. Oct. 11, 2000); *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1381-83 (N.D. Ill. 1984); *Miller v. Affiliated Financial Corp.*, 600 F. Supp. 987, 994 (N.D. Ill. 1984); *R.E. Davis Chemical Corp. v. Nalco Chemical Co.*, 757 F. Supp. 1499, 1526 n.24 (N.D. Ill. 1990); *First Nat'l Bank and Trust Co. v. Hollingsworth*, 701 F. Supp. 701 (W.D. Ark.

(continued...)

serious doubts about such relief,[18] or declined to decide the question.[19] The decision below stands quite alone.

B. Conflict with this Court's Precedent

This Court has already construed the statutory language in question, in another statute, *not* to authorize private injunctive relief. *See Minnesota v. Northern Securities Co.*, 194 U.S. 48, 70-71 (1904) (section 7 of antitrust statute does not authorize private suits for equitable relief). *Accord Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917). The parallels to RICO are striking. *Compare* 194 U.S. at 68 (section 7 provided: "Any person who shall be injured in his business or property . . . by reason of anything forbidden or declared to be unlawful by this act may sue therefor . . . and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee") *with* App. 299a (RICO § 1964(c)).

With RICO, Congress employed the "use of an antitrust model for the development of remedies" against crime. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151

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[17](...continued)
1988).

[18]*E.g., Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990); *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 28 (2d Cir. 1983); *Sedima, S.P.R.L. v. Imrex*, 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *Johnson v. Collins Entertainment Co.*, 199 F.3d 710 (4th Cir. 1999); *Ganey v. Raffone*, 91 F.3d 143 (6th Cir. 1996) (1996 WL 382278 at **4 n.6); *Raymark Industries, Inc. v. Stemple*, 714 F. Supp. 460, 475-76 (D. Kan. 1988).

[19]*E.g., Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983); *Airline Reporting Corp. v. Barry*, 825 F.2d 1220, 1223 (8th Cir. 1987).

(1987). The "clearest current in the legislative history of RICO is the reliance on the [antitrust] model." *Id.* (internal quotation marks and citation omitted). *Accord Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985). It follows that the same language held *not* to authorize injunctive relief in an antitrust statute does *not* authorize injunctive relief under RICO:

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. . . . It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Holmes v. SIPC, 503 U.S. 258, 268 (1992) (citations omitted).

C. Disregard of Text and History of RICO

1. RICO's Statutory Text

The remedies provision of RICO (18 U.S.C. § 1964) is set forth in the Appendix, App. 308a-309a.[20]

Subsection (a) confers jurisdiction upon the district courts and authorizes broad equitable remedies. This provision, however, does not specify who may seek the relief authorized.

Subsection (b) authorizes the U.S. Attorney General to "institute proceedings under this section." This subsection does not specify the ultimate relief the Attorney General may seek, and thus such relief plainly encompasses the full range of remedies for which subsection (a) creates jurisdiction.

Subsection (c) then specifies that "[a]ny person injured in his

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[20]The version set forth in the Appendix was effective at the time the present lawsuit was filed. In 1995, Congress amended subsection (c) in a way irrelevant here. The 1995 amendment does not apply to actions, like the present suit, commenced prior to December 22, 1995.

business or property . . . may sue therefor . . . and shall recover threefold the damages he sustains . . . ." Unlike subsection (b), there is no blanket authorization to institute proceedings; instead, the provision specifies a right to sue and a remedy, namely, treble damages. Subsections (b) and (c) are decidedly *not* parallel; hence, contrary to the court below, no "parity of reasoning," App. 10a, leads to the conclusion that private parties can claim the universe of relief authorized under subsection (a). Indeed, were the contrary true, private parties would be entitled to sue, not just for treble damages and injunctions, but also for such relief as dissolution of enterprises. *See* § 1964(a).[21]

The statutory text of RICO therefore indicates that Congress did *not* authorize private injunctive relief:

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); *accord Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 731-32 (1989). For example, this Court has held that a statute expressly authorizing

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[21]The Seventh Circuit's reliance (App. 11a) on *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1990), is puzzling. That case merely held that a provision giving courts "jurisdiction in actions brought under [a subsection] . . . to enforce the requirement concerned" did not make every element of the pertinent substantive subsection "jurisdictional" such that failure of an element would defeat, not just the claim, but subject matter jurisdiction. *Id.* Petitioner made no such argument regarding RICO.

Meanwhile, the Seventh Circuit's reliance on RICO's "liberal construction" directive, App. 12a, is sheer makeweight, *see Reves v. Ernst & Young*, 507 U.S. 170, 183-84 (1993), as is the panel's invocation of broad "underlying purposes" of RICO, App. 13a.

private citizens to sue for injunctions would not be construed as implying a private right of damages. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15. *Accord Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

This Court has consistently understood subsection (c) as authorizing a "private treble-damages action," *Sedima*, 473 U.S. at 486. *Accord id.* at 481, 487-88, 490, 493; *Agency Holding Corp.*, 483 U.S. at 151-52; *Klehr v. A. O. Smith Harvestore Products, Inc.*, 521 U.S. 179, 183 (1997); *Rotella v. Wood*, 528 U.S. 549, 551 (2000); *Beck v. Prupis*, 529 U.S. 494, 496 & n.1 (2000) (describing RICO provisions for criminal penalties and civil suits, and separately noting that RICO "authorizes *the Government* to bring civil actions to 'prevent and restrain' violations") (emphasis added). The decision below directly challenges this consistent understanding of civil RICO.

2. RICO's Legislative History

The legislative history of RICO confirms, indeed compels, the conclusion already drawn from the text of RICO: private injunctive relief is not available under RICO.

a. Selection of treble damages remedy

RICO was enacted as Title IX of the Organized Crime Control Act of 1970. *Sedima*, 473 U.S. at 486. The Senate, which passed the legislation first, did not provide for private party suits under RICO.

> The civil remedies in the bill passed by the Senate, S 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d).

473 U.S. at 486-87. The "private treble-damages action" was added, later, in the House of Representatives. *Id.* at 487-88. The Senate then adopted the bill as amended in the House. *Id.* at 488. As the Fifth Circuit explained, "Section 1964(c), providing the treble damage remedy, then becomes a branch grafted onto the already-completed trunk of the statute." *Fredeman*, 843 F.2d at 829 (footnote omitted).

This "grafted-on branch" very specifically authorized "a private treble-damages action," *Sedima*, 473 U.S. at 487, as a supplement to federal government enforcement of the statute, and as a remedy for those wronged by organized crime, *id.* *See also Agency Holding Corp.*, 483 U.S. at 151 (RICO's civil enforcement provision was designed "to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees"); *id.* ("the mechanism chosen to reach the objective in . . . RICO is the carrot of treble damages"). The selection of a treble damages remedy, and *only* a treble damages remedy, was plainly a deliberate choice by Congress.

b. Rejection of private injunctive remedy

That Congress deliberately limited private civil relief to treble damages (and costs and attorney fees) appears even more clearly from the rejection by Congress of proposals to authorize private injunctive relief:

> in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.

Wollersheim, 796 F.2d at 1086 (emphasis in original).

RICO predecessor legislation in the Senate and in the House explicitly allowed for private party injunctive relief. *Id.* at 1084. *See* 115 Cong. Rec. 6,992-96 (1969) (discussing predecessor Senate bills); H.R. 19215, 91st Cong., 2d Sess. (1970) (predecessor House bill). In fact, Representative Steiger, who proposed the addition of the treble damages provision, *Sedima*, 473 U.S. at 487, made that proposal in an amendment which also included a provision for private injunctive relief. *See* 116 Cong. Rec. 27,738-39 (1970) (Steiger Amendment, proposed subsection (c), provided: "Any person may institute proceeding under subsection (a) [of § 1964] . . . [and] relief shall be granted in conformity with the principles which govern the granting of injunctive relief . . ."). The House Committee on the Judiciary, however, adopted only the private treble damages remedy, not the private injunctive remedy. *See* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4034. Rep. Steiger, while "extremely pleased . . . that the Judiciary Committee has approved . . . a provision authorizing treble damage actions by private persons," 116 Cong. Rec. 35,227 (1970), nevertheless lamented that the committee version did "not do the whole job," *id.* In particular, Rep. Steiger bemoaned the fact that "the Judiciary Committee version . . . fails to provide . . . equitable relief in suits brought by private citizens." *Id.* at 35,228.

On the floor of the House Rep. Steiger again "offered an amendment that would have allowed private injunctive actions" under RICO, *Sedima*, 473 U.S. at 487. *See* 116 Cong. Rec. 35,228, 35,346 (1970). "The proposal was greeted with some hostility . . . and Steiger withdrew it without a vote being taken." *Sedima*, 473 U.S. at 487-88. *See* 116 Cong. Rec. 35,346-47 (1970). As this Court has explained, the reason for this hostility, for the withdrawal of the proposal, and for the

reference of the proposal instead to a committee, was precisely because the proposed amendment "included yet another civil remedy," *Agency Holding Corp.*, 483 U.S. at 154, namely, private injunctive relief. *See* 116 Cong. Rec. 35,346 (1970) (statement of Rep. Poff) (Steiger amendment "does offer an additional civil remedy" and "prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have").[22]

In sum, Congress repeatedly declined to authorize private

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[22]Congress failed to enact legislation, proposed the very next term after the enactment of RICO, which was designed "to broaden even further the remedies available under RICO. In particular, it would have . . . permitted private actions for injunctive relief." *Agency Holding Corp.*, 483 U.S. at 155. *See also Sedima*, 741 F.2d at 489 n.20. *See* 117 Cong. Rec. 46,386 (1971) (statement of Sen. McClellan) (Title IV of "Victims of Crime Act of 1972" would "authorize private injunctive relief from racketeering activity"); *id.* at 46,393 (text of bill proposing to amend RICO to add private injunctive remedy); *Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 3 (1970-1971) (text of proposed bill providing for private injunctive relief under RICO); *id.* at 51 (same); *id.* at 158 (statement of Richard Velde, Associate Administrator, Law Enforcement Assistance Administration) (proposed legislation "would expand the available civil remedies. Section 1964 [of RICO] would be amended to permit any person to institute a civil proceeding to prevent or restrain violations . . . . Now only the United States can institute injunctive proceedings"); 118 Cong. Rec. 29,368 (1972) (text of "Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972" proposing *inter alia* to amend RICO to add private injunctive relief); *id.* at 29,370 (statement of Sen. McClellan) (bill "authorizes private injunctive relief from racketeering activity").

In 1973, Congress again considered, and failed to enact, a bill to amend RICO by adding private injunctive relief. *See* 119 Cong. Rec. 10,317-19 (1973) ("Civil Remedies for Victims of Racketeering Activity and Theft Act of 1973").

injunctive relief under RICO. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983) (citing "evolution of [RICO's] statutory provisions" as aid to statutory construction, and adding, "[w]here Congress includes [certain] language in an earlier version of the bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended").

D. Importance of the Question

As noted above, the court below has created a conflict in the circuits. And by in effect amending RICO to authorize private civil suits for injunctive relief, the Seventh Circuit has abolished the federal government's exclusive prerogative to seek such relief. Not only is this an affront to a unique federal executive power, it is an open invitation to abuse. Under the decision below, private parties are no longer limited to damages for the harm they suffered; they now can seek prospective relief wholly independent of, and potentially in conflict with, the decisions of the Attorney General regarding pursuit of such relief. Furthermore, private parties do not have the political accountability, or the duty to exercise prosecutorial discretion, that apply to the federal government. Hence, the RICO injunctive weapon, thanks to the court below, can now be misused -- as in the present case -- as a means of waging political or commercial warfare against one's adversaries.

II. THE SEVENTH CIRCUIT STRETCHED THE HOBBS ACT BEYOND RECOGNITION.

The Seventh Circuit has in effect eliminated the "obtaining of property" element from the federal criminal extortion statute, replacing it with "interference with rights." App. 36a. This is a gross overreading of the Hobbs Act, 18 U.S.C. § 1951 (App. N). The consequences of this rewriting of the Hobbs Act are dramatic and dangerous: now any unlawful protest activity, and any governmental interference with rights, constitutes federal

criminal extortion and racketeering.

Social protest has a long and revered history in this nation. From the burning or hanging of effigies in colonial times, to the temperance activists' disruption of taverns, to the civil rights and anti-war sit-ins of the 1960's and 1970's, demonstrations -- even illegal ones -- have been both an outlet for dissent and an instrument for social and legal change. In totalitarian regimes, demonstrators are crushed by tanks. By contrast, this nation boasts the rule of law -- no more, no less. To be sure, protesters may be arrested, fined, or jailed for offenses they commit, but they are not treated like hardcore criminals -- unless the Seventh Circuit's misreading of the Hobbs Act stands.

The court below held that pro-life sit-ins at abortion facilities violate the federal extortion statute, 18 U.S.C. § 1951, and thus qualify as "racketeering" under RICO, 18 U.S.C. § 1961(1). According to the Seventh Circuit, despite the text of § 1951 ("'extortion' means the obtaining of property from another . . ."), an "extortionist" can "violate the Hobbs Act without either seeking or receiving money or anything else," App. 36a. "A loss to, or interference with the rights of, the victim is all that is required." *Id.*[23] Thus, any protest activity that crosses into tortious or illegal behavior (a trespass, an obstruction, an instance of physical contact) now subjects the actor to federal criminal felony liability as an "extortionist" under the Hobbs Act and a "racketeer" (if two or more acts are involved) under RICO. A more deadly recipe for social protest could scarcely be imagined.

The decision below also creates considerable mischief for government actors. The Hobbs Act proscribes the extortionate

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[23]The court below claimed support in "a long line of precedent," *id.*, but the "precedent" is merely lower court dicta. *See generally* Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691, 718-19 & n.124 (1999).

"obtaining of property . . . under color of official right." § 1951(b)(2). Under the decision below, this means "[causing a] loss to, or interfer[ing] with the rights of, the victim," App. 36a, under color of official right. Thus, any police misconduct (false arrest, excessive force, etc.) or other act of government officials (e.g., withholding a municipal permit for a pornography business or gun store) that interferes with someone's rights, has now become federal criminal extortion and racketeering.

The decision below creates mischief for federal robbery law as well. The "robbery" section of the Hobbs Act also uses the term "obtaining": "robbery" is the "taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury . . .," 18 U.S.C. § 1951(b)(1). Under the panel's distorted view of "obtaining," a protester who pushes someone to the ground, causing that person's pants to tear or glasses to break, commits "robbery" ("obtaining" the pants or glasses by actual force). The bumping of opposing demonstrators would become the stuff of felony prosecutions and civil RICO suits.

The Seventh Circuit's rewriting of the Hobbs Act does *not* square with the law. In *United States v. Enmons*, 410 U.S. 396 (1973), the defendants wrongfully caused property losses and interfered with rights, *id.* (recounting acts of violence); *id.* at 399 ("wrongful violence" is redundant), yet there was no extortion: defendants did not wrongfully *obtain property*, *id.* at 399-400. *See id.* at 400 (distinguishing the obtaining of "personal payoffs"); *id.* at 406 n.16 (distinguishing "obtaining a financial benefit for himself" and a "payoff": the "entire character [of the demonstration] changed . . . when it was used as a pressure device *to extract the payment of money*") (emphasis added). *See also Evans v. United States*, 504 U.S. at 255, 259-60 (1992) (common law, from which Hobbs Act borrowed, required that public official "took . . . money" under

color of his office in order to constitute extortion).

The Ninth Circuit, in sharp contrast to the Seventh Circuit, recently explained the proper significance of the "obtaining" element in the Hobbs Act:

> The [defendants] sought not only to put [the victim] out of business, but actually to get his business interests for themselves. That is important with regard to the "obtaining" element of the Hobbs Act. . . . [U]nder the Hobbs Act, *extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining"*: someone -- either the extortioner or a third person -- must receive the property of which the victim is deprived. . . . *[C]f. United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958) (finding allegation that defendant tried to put victim out of business insufficient to show "obtaining" for purposes of "robbery" under the Hobbs Act). *See generally* Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691, 704-712 (1999) (tracing extortion from the common law through the Hobbs Act and concluding that extortionate "obtaining" requires not only that a victim be deprived of property, but also that someone get the property as a result of the deprivation).

United States v. Panaro, 266 F.3d 939, 948 (9th Cir. 2001) (emphasis added).

The Seventh Circuit's expansive rewriting of federal extortion law also flies in the face of several established norms of statutory construction: avoidance of constitutional difficulties (here, for example, the due process problem of *post hoc* transforming the traditional social protest tactic of the sit-in into felony extortion, *see Bouie v. Columbia*, 378 U.S. 347 (1964)); the "clear statement" rule for federal incursions into

traditional state police powers; and the rule of lenity.

III. THE SEVENTH CIRCUIT UPHELD A JUDGMENT RESTING IN PART UPON FICTIONAL GENERIC STATE EXTORTION LAW.

NOW alleged acts of predicate extortion in violation of the laws of various states. The district court obliterated the distinct extortion law of the several states and instead substituted a generic state extortion law in its jury instruction. This was the antithesis of respect for state law. Furthermore, the generic extortion offense was not a RICO predicate. The court below ruled that any error was harmless, App. 36a, but on this the court below was plainly wrong, *supra* note 15, and in conflict with the pertinent precedent of this Court, *see Griffin v. United States*, 502 U.S. 46, 53-56, 59 (1991) (reviewing court must overturn jury verdict that may rest on unconstitutional or illegal theory).

Predicate acts under RICO include "any act or threat involving . . . extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year . . . ." 18 U.S.C. § 1961(1)(A). This provision entails two separate criteria. First, the offense must constitute "extortion" within the meaning of RICO, § 1961(1)(A). This is a question of federal law. *United States v. Nardello*, 393 U.S. 286 (1969).[24] Second, the offense must be a criminal violation under state law

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[24]If the term "extortion" in RICO did not have a meaning determined as a matter of federal law, the scope of RICO would be at the mercy of state statutory labelling. One state could apply the label "extortion" to include coercion or assault or trespass, while another could decline to use the label "extortion" for any offense at all, instead employing a term like "blackmail." The *Nardello* Court repudiated such an approach: "the fallacy of this contention lies in its assumption that, by defining extortion with reference to state law, Congress also incorporated state labels for particular offenses." *Id.* at 293.

punishable by imprisonment in excess of one year -- a question of state law.

A. Federal criterion

In *Nardello*, this Court construed the term "extortion" in the federal Travel Act to mean "acts prohibited by state law which would be generically classified as extortionate," i.e., "obtaining something of value from another with his consent induced by the wrongful use of force, fear or threats." 393 U.S. at 290; *id.* at 295. The same construction applies to the term "extortion" as used in RICO. "When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition." *Salinas v. United States*, 522 U.S. 52, 63 (1997) (construing RICO). The federal, *Nardello* definition of extortion essentially tracks the elements of the Hobbs Act; hence, the same failure to require the "obtaining of property" that dooms the Hobbs Act predicates in this case also requires reversal of the state predicates, even apart from the trial court's failure to instruct on the elements of state extortion law.

B. State criterion

The judgment below also fails the second, state-law criterion. The district court failed to instruct the jury on the elements of extortion applicable in the various states where predicate acts allegedly occurred. Instead, the district court gave a generic instruction supposedly valid for all fifty states. Tr. 4946-48.

This generic approach was erroneous. NOW had an obligation to prove, for each supposed act of state law extortion, the elements of the state statute which applied at that time and place. *See* Tr. 4355-58. Yet the jury was left adrift, free to apply nonexistent generic law to the acts at issue.

The generic instruction failed to account for varying state limits on extortion offenses. NOW's counsel called the generic

model the "most strenuous" version of the state extortion statutes, Tr. 4356, but this is simply not true. For example, in Delaware (the location of respondent DWHO), extortion requires that a defendant compel or induce another "to deliver property to himself or to a third person," Del. Code Ann. tit. 11 § 846 (Supp. 1994), while the district court's instructions merely required compelling another "to give up" a property right, Tr. 4947. In Wisconsin (the location of respondent Summit), extortion requires an "intent . . . to extort money or any pecuniary advantage whatever," Wis. Stat. Ann. § 943.30(1) (West 1982),[25] but the district court failed to instruct the jury that it must find any such pecuniary intent, Tr. 4946-48. Defects plague the generic instruction with respect to many other states at issue here as well.[26]

The permissibility of replacing various state laws with a generic substitute has immense implications not just for multistate RICO actions, but also for the certification and adjudication of multistate class actions generally. *See* Rule 23(a), (b)(2), (b)(3) (elements of class action litigation include common questions of law, typicality of the legal claims of the class representatives, general applicability of the issues to the class, predominance of common questions of law). *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609-10, 624

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[25]The Wisconsin statute also proscribes similar acts "with intent to compel the person so threatened to do any act against the person's will or omit to do any unlawful act." *id.*, but this is the distinct offense of coercion, which is not a RICO predicate act. *See* App. O ("coercion" not listed among RICO predicates); 31A Am. Jur. 2d *Extortion, Blackmail, and Threats*, §§ 40, 49-50 (1989) (coercion and extortion as independent offenses); Model Penal Code § 212.5 & cmt. 2 at 264, 266 (1980); *id.* § 223.4 & cmt. 1 at 201-03; *id.* at § 223.0(5). That Wisconsin has chosen to classify extortion and coercion under the same statutory label is irrelevant. *Supra* note 24.

[26]Such defects were addressed at length in the briefs filed below.

(1997) (noting differences in state law as undermining "predominance" requirement for class action lawsuit). There would be no significance to the variety of state laws at issue in multistate class actions, if courts could simply substitute a watered down, generic state law for the disparate elements of particular state laws.[27] Moreover, dispensing with the elements of pertinent state law violates due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985).

IV. THE SEVENTH CIRCUIT FAILED TO RESPECT THE FIRST AMENDMENT.

When first reviewing the case at bar, this Court noted -- but did not reach -- the grave First Amendment concerns at stake in the use of civil RICO against a protest movement. *NOW v. Scheidler*, 510 U.S. 249, 262 n.6 (1994); *id.* at 263-65 (Souter, J., joined by Kennedy, J., concurring). Those concerns have materialized with a vengeance.

The court below conceded that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is "directly applicable" to this case, App. 22a, yet failed to follow that decision. In particular, the Seventh Circuit endorsed guilt by association and failed even to insist upon the specific jury findings which are essential to First Amendment review of a verdict on appeal.

The evidence in this case showed that defendants, including petitioner, engaged in substantial free speech activity in support of their goal of stopping abortion. App. 17a. NOW proved that some anti-abortion activities were unlawful, primarily numerous sit-ins at abortion businesses. But

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[27]NOW also invoked as RICO predicates violations of the Travel Act, which applies to "extortion . . . in violation of the laws of the State in which committed or of the United States." 18 U.S.C. § 1952. Whereas both the Hobbs Act and state law extortion claims fail in this case, the Travel Act claim fails as well.

> the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

Claiborne Hardware, 458 U.S. at 916-17.

> While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.
>
> The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another. . . .
>
> . . . .
>
> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence.

Id. at 918-19, 920.

The only damages awarded in this case were for additional security expenses incurred by respondents DWHO and Summit. Tr. 2003-04. In essence, the defendants were held strictly liable for the respondents' expenses for security systems, guards, lock repairs, and armored car services from 1985-1997, *see* Tr. 2015-2100.

The clinics' theory was associational liability. As their sole witness for damages testified, it did not matter whether the defendants could be tied directly to the bulk of clinics' increased security costs. Tr. 2224-25.

> Because the defendants were active participants in PLAN and because PLAN is the coalition or the enterprise, they are

> responsible for the actions of anyone who is associated with PLAN that is carrying out that strategy.
>
> . . . .
>
> Because again we are suing the defendants for any of the actions of anyone associated with PLAN during this period of time for their illegal actions or activities against these two clinics, whether or not they're defendants in this case.

Tr. 2228, 2231 (testimony of Susan Hill). The district court's instructions and jury verdict form endorsed this theory of guilt by association, holding defendants liable for the acts of "any person associated with PLAN," *see* App. P (#4, 7, 9, 10).

The Seventh Circuit nevertheless concluded that Jury Instruction No. 30 (set forth at App. 25a) completely cured this unconstitutional guilt by association. App. 25a-26a. This conclusion is erroneous.

First, the jury verdict form presented a self-contained, step-by-step process for the jury. *See* App. P; *id.* at 314a. The verdict form did cross-reference several other instructions, but not Instruction 30. In fact, the verdict form was inconsistent with that instruction. Hence, there is no basis for concluding that the jury chose to follow the unreferenced Instruction 30 instead of the self-contained verdict form.

Second, Instruction 30, while of some help, was still insufficient. Even this "limiting" instruction permitted liability for acts "indirectly" authorized or ratified by the enterprise (not defendants) or those acting on behalf of the enterprise (not defendants). App. 25a (quoting instruction). The only "limit" was that defendants hold a specific intent to further illegal *objectives* (e.g., to promote anti-abortion sit-ins), not to authorize the actual illegal *activities* (e.g., gluing locks shut, *see* Tr. 2093, 2101-02).

Third, the jury's damage award shows that defendants' First

Amendment rights were simply not respected. The jury awarded plaintiffs the full amount of damages they sought, but those damages blatantly included items that were sheer penalties on association. For example, respondent DWHO sought to recover the expense of armored car services incurred year after year. *E.g.*, Tr. 2017-18, 2024, 2049, 2051, 2058, 2068, 2071, 2077. None of the defendants had ever sought to rob any abortion facilities; indeed, respondents never even alleged robbery as a predicate offense. Why were defendants supposedly liable? Because one Steve Elliot, and other unknown persons, had allegedly followed clinic employees to the bank. Tr. 2017-18, 2149. Elliot and some unknown others, in turn, were allegedly associated with Joan Andrews. Tr. 2030, 2149-50. And Andrews in turn was a member of PLAN. Tr. 2030. Hence, under respondents' theory, the defendants were liable for annual armored car services at DWHO. The jury awarded these damages, Instruction No. 30 notwithstanding.

Even if it were not obvious that the jury imposed unconstitutional damages on defendants, the verdict would have to be overturned.

First Amendment review of damages or other liability simply cannot occur without the finder of fact specifying what acts it found, and by whom, to have caused the damages or injury. Liability "must be supported by findings that adequately disclose the evidentiary basis," that "identify the impact of such unlawful conduct," and that "recognize the importance of avoiding the imposition of punishment for constitutionally protected activity," *Claiborne*, 458 U.S. at 933-34.

By declining to require the jury to identify any specific acts, much less which defendants were responsible for which acts, the district court precluded any meaningful First Amendment review of the jury's factual findings, contrary to *Claiborne Hardware*, 458 U.S. at 924.

The Second Circuit recently applied precisely this First Amendment principle in overturning a civil judgment against an anti-abortion protester. *People of New York ex rel. Spitzer v. Operation Rescue National*, 273 F.3d 184 (2d Cir. 2001). Recognizing its constitutional duty independently to review the record in First Amendment cases, *id.* at 193, the court vacated the imposition of injunctive relief as to protester Michael Warren for insufficient factual findings. As the Second Circuit explained,

> the District Court failed to set forth clear findings related to the different individuals named in the injunction. . . . In place of such particularized findings, the District Court issued findings that tended to discuss habitual behavior of a group of defendants without specifying who exactly was engaging in that behavior. The lack of particularized findings creates the genuine risk -- a risk that may have been realized in Warren's case -- that a person's political associations or participation in political protests will serve as the conduit for a finding of liability . . . .

Id. at 199-200. The Second and Seventh Circuits are thus in direct conflict over whether the First Amendment requires particularized findings, regarding who did what, prior to the imposition of civil liability.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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